IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS

MARK T. EDDINGSTON, JEFFERY M. DAVIS, ELRIDGE NICHOLAS BOLLICH, RAY A. COX, and GEORGE GALANIS, Plaintiffs, v. UBS FINANCIAL SERVICES, INC., Defendant.	§ § § § § § § § § § § § § § §	CIVIL ACTION NO. 2:12-CV-00422
BILL HENDRICKS and AUBREY B. STACY, Plaintiffs, v. UBS FINANCIAL SERVICES, INC., Defendant.	§ § § § § § § § § § §	CIVIL ACTION NO. 2:12-CV-00606

DEFENDANT UBS FINANCIAL SERVICES, INC.'S
MOTION TO COMPEL INTERROGATORY RESPONSES

Pursuant to Rules 26, 33, and 37 of the Federal Rules of Civil Procedure and Rules 7 and 26 of the Local Rules of the United States District Court for the Eastern District of Texas, UBS Financial Services, Inc. ("UBS") hereby moves for an order compelling Lead Plaintiffs Mark Eddingston, Jeffery Davis, Eldridge Nicholas Bollich, Ray A. Cox, Bill Hendricks, and Aubrey B. Stacy (collectively, "Plaintiffs") to provide answers to certain interrogatories in UBS's First and Second Sets of Interrogatories (the "Interrogatories") that these Plaintiffs have refused to properly answer.

PRELIMINARY STATEMENT

UBS brings this motion to compel complete answers to several interrogatories propounded by UBS that Plaintiffs have answered in an incomplete and evasive manner, and in some instances have simply refused to answer. None of Plaintiffs' objections are justifiable; the disputed interrogatories are expressly permitted under the Federal Rules of Civil Procedure and the weight of authority, as they are reasonably calculated to discover evidence relevant to Plaintiffs' motion for class certification.

This discovery dispute arises in a putative class action in which Plaintiffs seek amounts "forfeited" under the express terms of two deferred compensation plans, respectively called PartnerPlus for Financial Advisors and PartnerPlus for Branch Managers.[1]

Plaintiffs maintain that the PartnerPlus Plans are governed by ERISA, and that the Plans' vesting and forfeiture provisions violate ERISA. Alternatively, Plaintiffs claim that, even if the PartnerPlus Plans are not governed by ERISA, the requirement that an otherwise eligible participant leaving UBS's employ sign a separation agreement containing a non-compete provision in order to receive "unvested benefits" violates §§ 15.05 and 15.50 of the Texas Business and Commercial Code. Plaintiffs and Defendant have both sought discovery regarding class certification.

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[1] PartnerPlus for Financial Advisors is the deferred compensation plan at issue in the *Eddingston* case, while PartnerPlus for Branch Managers is the deferred compensation plan at issue in the *Hendricks* case.

With respect to Plaintiffs' motion for class certification, UBS has pointed out that each of the named Plaintiffs in both cases signed Compensation Plan agreements containing class action waivers. Plaintiffs have responded that those waivers are unenforceable as they constitute unauthorized amendments to the PartnerPlus Plans, which they allege are covered by ERISA.

To flesh out the key facts related to class certification, the parties have propounded discovery relating to Plaintiffs' claims under both ERISA and Texas state law. For example, Plaintiffs have sought and obtained thousands of pages of documents regarding the PartnerPlus Plan, including documents that they hoped (mistakenly) would support their claim that PartnerPlus is a retirement plan covered by ERISA. UBS is in the process of reviewing thousands of additional documents and communications that Plaintiffs requested. A senior UBS executive was deposed for a full day, also in an (unsuccessful) attempt to support Plaintiff's contention that PartnerPlus is an ERISA plan.

For its part, UBS proffered interrogatories that seek information relating to the core allegations in Plaintiffs' complaint. For example, UBS asked Plaintiffs to identify each person with knowledge of the facts underlying the Amended Complaint's allegations, including the person's name and address, and to identify documents related to that person's knowledge. *See* Ex. A at No. 2. UBS also requested information and documents regarding the pay and benefits Plaintiffs received from their new employer after leaving UBS, as well as the Plaintiffs' reason for leaving

UBS for a competitor. *Id*. at No. 11 and 12.[2]

Even as UBS has provided voluminous discovery materials—some of them on an expedited basis at Plaintiffs' request—Plaintiffs have failed to provide complete answers to several Interrogatories. Indeed, Plaintiffs delayed for weeks by agreeing to supplement their deficient interrogatory answers, only to provide a supplemental response that continued to reflect glaring omissions. Plaintiffs have also refused to provide any information regarding their post-UBS employment, arguing that information related to their new employers is irrelevant to this case.

Plaintiffs' reasons for failing to fully respond are contrary to the Federal Rules of Civil Procedure and the Local Rules of this Court as well as the governing cases enforcing those rules. Despite a good-faith effort to confer by UBS, Plaintiffs have made clear that they will not comply with their discovery obligations absent Court intervention. This Court should therefore issue an order compelling Plaintiffs to answer the challenged Interrogatories.

BACKGROUND

On February 22 and March 8, UBS served the Interrogatories on Plaintiffs. On March 27, Plaintiffs Bollich, Cox, Hendricks, and Stacy served their Objections and Responses to UBS's Interrogatories. *See* Ex. A. Plaintiffs Davis and Eddingston served their Objections and Responses on March 29. *See id*.

In their Objections and Responses, Plaintiffs refused to provide answers to many of the Interrogatories propounded by UBS, including the following that are the subject of this motion:

- Interrogatory No. 2: Asking Plaintiffs to state, "[f]or each person you believe has knowledge of any of the facts underlying any of the claims in the Amended Complaint or the subject matter of this litigation," (a) the person's name, address, and relationship to the Plaintiff; (b) the person's current employer and position, and whether the person's former employer was UBS; (c) the facts supporting that person's knowledge; and (d) "the identity of any documents which relate to the person's information or knowledge."

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[2] UBS has avoided unnecessary discovery burdens on Plaintiffs. For example, it offered and agreed to accept a single Plaintiffs' deposition in each case as representative of the testimony for all named Plaintiffs in that case.

- Interrogatory No. 4: Asking Plaintiffs to identify each person from UBS "who, either individually or as part of a group, communicated with you, orally or in writing, regarding the Plan."

- Interrogatory No. 11: Asking Plaintiffs to identify employers "who have offered you employment or for whom you have worked since your employment with UBS ended," and to identify, among other things, (a) the employer's name, address, and location; (b) "a brief description of your job duties"; and (c) "your rate of pay" and other benefits.

- Interrogatory No. 12: Asking Plaintiffs to identify and describe, for each employer identified in Interrogatory No. 11, Plaintiffs' "efforts to become employed with such employer."

Plaintiffs' initial responses either provided woefully incomplete answers or objected to providing any answers at all. Plaintiffs raised identical objections in their responses and the small amount of factual information provided by the respective Plaintiffs had little, if any, variation. *See* Plaintiffs' Responses to Interrogatories 2, 4, 11, and 12 (collectively, the "Disputed Interrogatories").

On April 22, counsel for UBS sent Plaintiffs' counsel a detailed letter explaining the deficiencies in Plaintiffs' discovery responses. *See* Ex. B. On May 1, Plaintiffs' counsel responded by letter stating that he would ask Plaintiffs to reconsider their responses to Interrogatories 2 and 4, but maintaining that Interrogatories 11 and 12 are irrelevant to the issues in this case. *See* Ex. C. On May 6, counsel for UBS and Plaintiffs met and conferred concerning Plaintiffs' discovery responses. Plaintiffs' counsel again agreed that the majority of Plaintiffs' interrogatory responses and document production would be supplemented, but asked that UBS provide authority demonstrating the relevance of information related to Plaintiffs' post-UBS compensation. On May 8, UBS's counsel provided Plaintiffs' counsel with authority demonstrating the relevance of

Plaintiffs' post-UBS compensation to the issues in this case and to class certification in particular. On May 9, Plaintiffs' counsel responded, again asserting that the requested information regarding Plaintiffs' post-UBS compensation is irrelevant.

On May 10, Plaintiffs responded to the Interrogatories that they had *agreed* to supplement with a one-page response that offered virtually no additional information beyond Plaintiffs' original answers. *See* Ex. D. On May 14, counsel for the parties again met and conferred concerning Plaintiffs' failure to appropriately supplement their interrogatory responses. On May 15, Plaintiffs' counsel provided draft supplemental responses that again refused to answer Interrogatories 11 and 12, seeking information related to Plaintiffs' post-UBS compensation. As to Interrogatories 2 and 4, the draft responses for each Plaintiff while greater in length, were practically identical and far from complete. *See* Ex. E.[3]

Because Plaintiffs have fallen far short of meeting their respective discovery obligations, UBS now brings this motion to compel.

ARGUMENT

Parties are entitled to propound interrogatories regarding "any nonprivileged matter that is relevant to any party's claim or defense[.]" Fed. R. Civ. P. 26(b), 33(a)(2). "It is well settled that the rules of discovery in the Eastern District of Texas are accorded a broad and liberal treatment to affect their stated purpose of adequately informing litigants in civil trials." *Collins v.*

[3] On the day before this motion was filed, UBS's counsel received an email from Plaintiffs' counsel stating that "[w]e anticipate the verified amended interrogatory answers being to you, with further elaboration beyond the drafts provided yesterday, tomorrow morning. If absence from the office is causing difficulty with anyone of those, I will let you know." In view of the outstanding dispute regarding Interrogatories 11 and 12 and Plaintiffs' past failures to provide full answers when it was represented that they would be provided, UBS proceeded with filing this motion.

Nissan N. Am., Inc., Civ. No. 2:11-cv-428-JRG, slip op. at 1-2 (E.D. Tex. May 9, 2013) (quoting *DDR Holdings, LLC v. Hotels.com, L.P.*, 2012 WL 2935172, at *2 (E.D. Tex. July 18, 2012)).

A. Plaintiffs' Evasive and Non-Substantive Responses To The Interrogatories 2 and 4 Fail To Properly Supply The Requested Information

Plaintiffs have failed to provide complete responses to Interrogatories Nos. 2 and 4, instead offering evasive and rote responses. Although Plaintiffs advance no objection to Interrogatory No. 2—as there is nothing to object to—they nonetheless fall far short of meeting UBS's specific and detailed requests for information.

Interrogatory 2 asked Plaintiffs to identify each person they believe has knowledge of the facts underlying the claims in the Amended Complaint, and to state, among other things, the "facts or information which you believe to be the substance of his or her knowledge." Ex. A at No. 2. In their initial response, each Plaintiff similarly stated that "I am the only individual with knowledge of the underlying facts in the Amendment Complaint as they apply to me." *Id*. Plaintiffs provided a similar, terse response to Interrogatory No. 4. *See* Ex. A at No. 4. In their May 15 draft supplemental response, each Plaintiff in identical fashion once again stated that he is the "only individual with knowledge of the underlying facts as they apply to me" (Ex. E at No. 4). They also identified documents, which they or UBS previously had produced, as relating to their knowledge.

Notably, however, none of the Plaintiffs described—as requested—the "facts or information" that underlie the claims in the Amended Complaint. For example, each Plaintiff states that "[t]he facts or information underlying claims asserted in this action or the subject matter of this action within my knowledge are based upon my employment with [UBS] and consist of my participation in [UBS's] PartnerPlus Plan, . . . by the making of deferrals thereunder and then forfeiture of amounts accrued for my benefit thereunder after my separation from [UBS]." *See*

Ex. E at 2. Each Plaintiff goes on to state that "I believe the other Plaintiffs in this action and the [companion action] have similar knowledge of similar facts based on similar sources." *Id*. But no Plaintiff provides any of the facts within his respective knowledge or within the knowledge of the other named Plaintiffs in either case, and the asserted "sources" of such knowledge remain a complete mystery.

Similarly, while each Plaintiff asserts that "I believe multiple branch managers [or financial advisors] of [UBS] who may or may not be plaintiffs have 'knowledge of the facts underlying claims asserted in the Amended Complaint or the subject matter of this action" (Ex. E at No. 2), no such branch managers or financial advisors are identified. During the class period, hundreds of branch managers and financial advisors were employed by UBS, making it impractical, indeed impossible, for UBS to locate the individuals to whom Plaintiffs refer. Also, while each Plaintiff relates that "[my] counsel is aware of other persons believed to have knowledge of the facts underlying the claims in the Amended Complaint or the subject matter of the action" (*id*.), no such individual is named.

Plaintiffs' responses to Interrogatory 4 are similarly deficient. That Interrogatory requested that Plaintiffs identify each person from UBS who communicated with them, orally or in writing, regarding the PartnerPlus Plans, and to specify when the communication took place and the content of the communication. *See* Ex. A at No. 4. In their May 15 supplemental responses, Plaintiffs, with the exception of Plaintiff Stacy, identically stated that they did not have any discussions with anyone at UBS except other named Plaintiffs. Ex. E at No. 4. (Plaintiff Stacy stated that he also had the discussion identified in his deposition. *Id*.) Once again, no Plaintiff identified the date of the communications or the content of the communications, as required by the Interrogatory.

Plaintiffs' responses are plainly insufficient and in violation of their obligation of candor in responding to UBS's Interrogatories. As the Fifth Circuit explained in *Dollar v. Long Mfg., N.C., Inc.*, 561 F.2d 613, 616 (5th Cir. 1977), "[d]iscovery by interrogatory requires candor in responding. . . . The candor required is a candid statement of the information sought or of the fact that objection is made to furnishing the information. A partial answer by a party reserving an undisclosed objection to answer fully is not candid. It is evasive." Interrogatories 2 and 4 require Plaintiffs to provide more details, such as "the facts or information" known to them about the Amended Complaint's allegations, "when and where [certain] discussion(s) or communication(s) took place," and the content of those communications. Ex. A at Nos. 2, 4. Plaintiffs' responses did not provide those details.

Moreover, Plaintiffs' objection to Interrogatory 4 on the grounds that it requests information related to the merits of the case is baseless. The merits of the case are implicated at this stage of the proceedings by Plaintiffs' defense that the Compensation Plan containing the agreed-to class action waiver constitutes an illegal amendment to an ERISA plan. As the U.S. Supreme Court recently stated, a court's analysis of class certification will "[f]requently . . . entail some overlap with the merits of the plaintiff's underlying claim." *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011). That is because "class determination generally involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff's cause of action." *Id.* at 2552. In this case, UBS's request for information is driven entirely by Plaintiffs' own assertions that the class waivers they previously agreed to cannot be enforced because the waivers were illegal "amendments" to an ERISA plan. And indeed, Plaintiffs themselves have sought and obtained extensive, burdensome discovery from UBS that is intended, in part, to support their own (mistaken) "ERISA defense" to arbitrating or litigating this case on a non-class basis.

Plaintiffs' refusal to answer these Interrogatories is improper.

B. Interrogatories 11 and 12 Are Designed To Lead To Admissible Evidence Relevant To The Claims And Defenses

Plaintiffs object to Interrogatory No. 12 on the grounds that it is not relevant to the claims or defenses in this case and therefore not likely to lead to admissible evidence. Ex. A at No. 12. UBS, however, is entitled to this information because the circumstances surrounding Plaintiffs' departure from UBS are relevant to these cases for several reasons.

As to the ERISA claim, UBS seeks this information to rebut Plaintiffs' assertion that PartnerPlus is an ERISA plan that may not be "amended" so as to preclude class litigation. In fact, PartnerPlus is a recruitment and retention tool that is necessary to hold onto financial advisers and branch managers in a highly competitive market. The incentives offered to Plaintiffs to leave UBS are directly relevant to UBS's need to offer a substantial deferred compensation program, not for retirement purposes, but to incentivize employees to remain. For example, Plaintiff Eddingston—whose deposition testimony Plaintiffs have stipulated is "representative" for *all* of the named and putative class members in the *Eddingston* case—received between $1.5 and $1.6 million to leave UBS for Morgan Stanley. *See* UBS Opp., Dkt. 77, No. 12-cv-00422 (E.D. Tex. Dec. 17, 2012), at 3. This more than made Eddingston whole for the approximately $336,000 he lost in deferred compensation by leaving UBS. *Id*. UBS believes the other Plaintiffs were also offered substantial financial enticements to leave UBS, which is directly supportive of UBS's explanation that plans like PartnerPlus are prevalent in the financial services industry not for retirement purposes, but because of the widespread, countervailing practices used by competitors to lure financial advisers and branch managers.[4]

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[4] UBS has also subpoenaed similar information from Plaintiffs' subsequent employers. The fact that UBS has sought information from a separate source, however, cannot preclude UBS

As to the Texas state law claim, UBS needs this information, first, to discern whether Plaintiffs' compensation at their new employer influenced their decision to leave UBS, notwithstanding their claim that they were forced to leave UBS "to save their careers." *See* Pls. Mem., Dkt. 35, No. 12-cv-00422 (E.D. Tex. Dec. 17, 2012). Under Texas law, incentives offered by competitors are relevant to whether UBS's non-compete agreement is necessary to protect its goodwill and business interests. *Marsh USA Inc. v. Cook*, 354 S.W.3d 764, 777 (Tex. 2011) (explaining that the "core inquiry" under the Texas non-compete statutory provision (Tex. Bus. & Com. Code § 15.50(a)) "is whether the covenant 'contains limitations as to time, geographical area, and scope of activity to be restrained that are reasonable and do not impose a greater restraint than is necessary *to protect the goodwill or other business interest of the promisee*'") (emphasis added); *see also Am. Nat'l Ins. Co. v. Cannon*, 86 S.W. 3d 801, 808 (Tex. App. 2002) (class certification inappropriate for claims challenging non-compete agreements because whether the agreements were "reasonable in view of the relevant market factors will require individual determinations").

The requested information is relevant, second, to determine whether "damages are capable of measurement on a classwide basis," or instead, "[q]uestions of individual damage calculation will inevitably overwhelm questions common to the class." *Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1433 (2013). Plaintiff Eddingston received compensation to make him whole for the deferred compensation he lost by leaving UBS. As noted, Plaintiffs already have stipulated that Eddingston's deposition testimony is "representative" for the class as a whole, and indeed, UBS believes that other named Plaintiffs received similar offsetting payments. This bears direct-

from seeking information from Plaintiffs themselves, who may have different or more complete information than the subsequent employers. And ironically, while refusing to turn over their own information on the ground that it is irrelevant, Plaintiffs have demanded that UBS provide them copies of whatever is produced by the subsequent employers.

ly on the mitigation of damages, and the accompanying question—for class certification purposes—of whether "questions of individual damages calculations will inevitably overwhelm questions common to the class." Accordingly, UBS's Interrogatories 11 and 12 seek information relevant to the key issues in this litigation and its defenses.

Plaintiffs also refuse to answer Interrogatory 11, asserting that the requested information is available through an on-line system known as FINRA BrokerCheck. Not true. Information for Mr. Davis, for example, is not available on BrokerCheck. And UBS requests information beyond that provided on BrokerCheck, such as Plaintiffs' rate of pay, compensation, and other benefits, and their respective reasons for leaving UBS. BrokerCheck does not provide information of that nature. *See* FINRA Broker Check—Search, available at http://brokercheck.finra.org/Search/Search.aspx. This request is not burdensome; it seeks information within Plaintiffs' control and should be answered. Because the requested information is clearly relevant to this case and is not burdensome to collect, the Court should compel Plaintiffs to provide responses to Interrogatories 11 and 12.

"When the discovery sought appears relevant, the party resisting the discovery has the burden to establish the lack of relevance by demonstrating that the requested discovery either does not come within the broad scope of relevance as defined under Fed.R.Civ.P. 26(b)(1) or is of such marginal relevance that the potential harm occasioned by discovery would outweigh the ordinary presumption in favor of broad disclosure." *Merrill v. Waffle House, Inc.*, 227 F.R.D. 467, 470-71 (N.D. Tex. 2005). Plaintiffs here have done neither. Rather, Plaintiffs have merely stated vague and inadequate objections that are facially insufficient. *See McLeod, Alexander, Powel & Apffel, P.C. v. Quarles*, 894 F.2d 1482, 1485 (5th Cir. 1990) ("[T]he party resisting discovery must show specifically how . . . each interrogatory is not relevant or how each question is overly broad, burdensome or oppressive. . . . [T]o say an interrogatory was 'overly broad, burdensome, oppressive and irrelevant' [is] not adequate to voice a successful objection to an interrogatory.") (internal quotation marks and citations omitted). Accordingly, Plaintiffs should be compelled to answer in full UBS's Interrogatories.

CONCLUSION

Each of Plaintiffs' objections and omissions is improper and reflects Plaintiffs refusal to comply with basic discovery obligations. For the foregoing reasons, UBS respectfully requests that the Court grant this motion to compel Plaintiffs to provide complete responses to the Disputed Interrogatories within seven days of the Court's order.

Date: May 17, 2013

Respectfully submitted,

/s/ Eugene Scalia

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CERTIFICATE OF CONFERENCE

I certify that I have complied with the meet and confer requirement of Local Rule 7(h) and that this motion is opposed. The personal conference required by Local Rule CV-7(h) was conducted on May 6, 2013 by telephone, between Michael C. Smith, Eugene Scalia, Paul Blankenstein and J. Nicci Warr, counsel for defendant UBS Financial Services, Inc.; and Robert E. Goodman for Plaintiffs. Further, on May 14, 2013, a telephone conference was conducted between Michael C. Smith, Eugene Scalia, Paul Blankenstein, and J. Nicci Warr for UBS; and Robert E. Goodman, Peter K. Stris, Jenifer Leigh Truelove, and Theodore Stevenson III for Plaintiffs. No agreement could be reached; discussions on this subject have conclusively ended in an impasse, leaving an open issue for the court to resolve.

/s/ Michael C. Smith
Michael C. Smith

/s/ Eugene Scalia
Eugene Scalia

CERTIFICATE OF SERVICE

I hereby certify that I have caused to be served by electronic mail on all counsel of record the foregoing Defendant UBS Financial Services, Inc.'s Motion to Compel Interrogatory Responses pursuant to Local Rule CV-5(a)(7)(C) on May 17, 2013.

/s/ Eugene Scalia
Eugene Scalia